IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 738 OF 1991

Smt.Kamalabai P. Lalji & ors. .. Petitioners

versus

M/s.J. Hirji & Co. and others. .. Respondents

...

Mr.C.R. Dalvi with A.G. Damle for the petitioners.

Mr.N.V. Walawalkar with Ms.Falguni Thakar i/b Rustamji & Jariwala for the respondent nos.3 to 5.

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WRIT PETITION NO. 4202 OF 1991

M/s.Krishnakumar Jethabhai & Co. .. Petitioners

versus

Smt.Kamalabai Purshottam Lalji

and others .. Respondents

...

Mr.N.V. Walawalkar with Ms.Falguni Thakkar i/b Rustamji & Jariwala for the petitioners.

Mr.C.R. Dalvi with A.G. Damle for the respondent nos.2 to 4.

Respondent no.1 - deleted vide order dated 6.7.1988.

Petition dismissed for non prosecution against respondent nos.5 and 6.

CORAM : D.G. KARNIK, J

DATED : 17th August 2004.

ORAL JUDGEMENT :-

1. Both the Writ Petitions are directed against a judgement and order dated 16th March 1991 passed by an appellate Bench of the Small Causes Court dismissing an appeal bearing Appeal no.507 of 1998. The Writ Petition no.738 of 1991 is filed by the landlords (the plaintiffs) and the Writ Petition no.4202 of 1991 is filed by the sub tenants (the defendant nos.3, 4, 5 & 6). Both the petitions arise out of a suit bearing R.A.E & R. Suit no.856/2819 filed by the landlords for possession of Vakhar 1 (Godown 1) on the ground floor of the property known as Shree Govardhan Niketan situate at

Gaiwadi, Cavel Street no.134-40 Bombay 400 002 (for short "the suit premises") For the sake of convenience, the parties are hereinafter referred to by their respective status in the suit.

2. The plaintiffs are the landlords and the defendant no.1 firm is the original tenant. It was in arrears of rent and permitted increases from 1st April 1978 to 31st December 1978. By a notice to quit dated 15th January 1979, the plaintiffs called upon the defendant no.1 to pay the arrears of rent and also demanded possession of the suit premises. As the defendant no.1 failed to pay the rent as per the demand notice, the plaintiffs filed a suit against the defendant no.1 for possession only on the ground of default. The plaint was amended in September 1986 and defendant no.2 was added as a party to the suit alleging that defendant no.1 had unlawfully sublet or unlawfully given on license the whole or part of the suit premises to the defendant no.2. A decree was also sought on the ground of unlawful subletting to defendant no.2. The plaint was further amended in January 1988 and defendant nos.3 to 6 were added as parties. By this amendment, the plaintiffs alleged that on or about

1st February 1967, the defendant no.1 had unlawfully sublet or unlawfully given on licence the entire suit premises to the defendant no.3 firm and the defendant nos.4 to 6 were its partners. By a judgement and order dated 12th December 1988, learned Single Judge of the Small causes Court passed a decree for possession against all the defendants on the ground of default and subletting. He held that the defendant no.1 was in arrears of rent for a period of more than six months and had failed to pay the same despite notice of demand dated 15th July 1979 and that the defendant no.1 had unlawfully sublet or assigned its interest in the suit premises to the defendant no.2 since April 1985. He also held that the defendant no.1 had unlawfully sublet the suit premises to the defendant no.3 firm from 1st February 1967. In view of the findings in favour of the plaintiffs on all the issues, the trial Court passed a decree for possession against all the defendants. The defendant no.2 did not file any appeal against the said judgement. However, the defendant no.1 and defendant nos.3 to 6 jointly filed an appeal bearing appeal no.507 of 1988 against the said judgement and decree joining the plaintiffs and defendant no.2 as

respondents. The appellate Court held that the plaintiffs had failed to prove that the defendant no.2 was in use and occupation of the suit premises as unlawful sub tenant. The appellate Court, however, held that defendant nos.3 to 6 were sub tenants. It further held that on the plaintiffs' own averments, the defendant nos.3 to 6 were sub tenants with effect from 1st February 1967 and by reason of amendment to the Bombay Rents Hotel and Lodging Houses Rates Control Act 1947 (for short 'the Act'), the subletting prior to 1st February 1973 was legalised and therefore, defendant nos.3 to 6 were not unlawful sub tenants. As regards the ground of default, the appellate Court held that the defendant no.1 was in arrears of rent for a period of more than six months and had failed to pay the rent despite notice of demand dated 15th January 1979. The appellate Court, therefore, dismissed the appeal and confirmed the decree for possession passed against the defendants. That judgement is challenged by the defendant nos.3, 5 and 6 (defendant no.4 having died in between) by filing of a Writ Petition bearing no.4202 of 1991. The findings recorded by the appellate Court that (i) the plaintiff had not proved that the defendant no.1

had sublet the premises to defendant no.2 and (ii) that the defendant nos.3 to 6 were the lawful sub tenants are challenged by the plaintiffs by filing the Writ Petition no. 738 of 1991.

Regarding subletting to defendant nos.3 to 6.

3. In paragraph no.3A of the plaint introduced by an amendment, the plaintiffs have stated thus:

> "On or about 1st day of February, 1967 the 1st Defendant have either unlawfully sublet or unlawfully given in licence the entire suit premises or unlawfully assigned or transferred their interest in the suit premises in any other manner by inducting the 3rd, 4th, 5th and 6th Defendants.

Thus, the plaintiffs themselves have alleged that the subletting to defendant nos.3 to 6 was made on or about 1st February 1967. The appellate Court has also held that the subletting to defendant nos.3 to 6 was made on or about 1st February 1967. The said finding of fact is in consonance of the pleadings of the plaintiff and is possible and proper. Clause (e) of sub section (1) of section 13 of the Act reads as follows:-

> 13(1) Notwithsanding anything contained in this Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-
>
> (a) to (d).....
>
> (e) that the tenant has, since the coming into operation of this Act, unlawfully sub-let or after the date of commencement of the Bombay Rents Hotel and Lodging Houses Rates Control (Amendment) Act, 1973, unlawfully given on licence, the whole or part of the premises or assigned or transferred in any other manner his interest therein; or
> (underlining supplied)

Sub clause (e) does not contemplate a decree for eviction against a tenant unless the subletting is unlawful. A decree on the ground of subletting cannot be passed if the subletting is lawful. Which subletting is lawful and which is unlawful is provided under section 15 of the Act. Sub section (1) of section 15 of the Act provides : notwithstanding anything contained in any law but subject to any contract to the contrary, it shall not be lawful for any tenant to sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. where a contract of letting permits subletting by a

tenant, the tenant can sublet but not otherwise. Sub section (2) of section 15 was amended by Maharashtra Act no.18 of 1987. Amended sub section (2) provides that the prohibition against the subletting of the whole or any part of the premises which have been let to any tenant would be deemed to have had no effect before 1st of February 1973; it further provides that notwithstanding anything contained in any contract or judgement or decree or order of a Court, any sublessee who was in possession of the premises on 1st February 1973 shall not be liable for eviction under clause (e) of sub section (1) of section 13. The effect of section 15(2) of the Act is that a person who was in possession of a premises as a sub tenant on 1st February 1973 is protected and his sub tenancy is legalised. The appellate Court was therefore, right in holding that defendant nos.3 to 6 were lawful sub tenants of the suit premises.

Reading subletting to defendant no.2.

4. The appellate Court has held that the defendant no.2 was not in use and occupation of the suit premises exclusively and was not a sub tenant of the defendant no.1. The first appellate Court has

discussed the entire evidence regarding the alleged subletting to defendant no.2 and I see no reason for taking a different view. There is one more circumstance which is against the plaintiffs. In paragraph no.3A of the plaint, the plaintiffs have alleged that the entire suit premises have been sublet to the defendant no.3 to 6 on 1st February 1967. If the defendant no.1 had sublet the whole of the premises and parted with the possession of the entire suit premises in favour of the defendant nos.3 to 6 there would be no occasion for it to part with the possession to defendant no.3 in 1985. The defendant no.1 itself was not in possession having sublet the entire premises to defendant no.3 on 1st February 1967. The defendant no.1 therefore could not have sublet the premises to defendant no.2 in the year 1985. The finding of the appellate Court on this issue is therefore, affirmed.

Default in payment of rent by defendant no.1.

5. The trial Court as well as the appellate Court have held that the defendant no.1 was in arrears of rent from 1st April 1978 to 31st December 1978. i.e. for a period of 9 months. The arrears

of rent and permitted increases amounting to Rs.1192.95 covering the period from 1st April 1978 to 31st December 1979 were demanded by the plaintiffs from the defendant no.1 by a notice of demand dated 15th January 1979. It is not disputed that the notice was received by the defendant no.1. Admittedly, the defendant no.1 did not pay the arrears of rent nor did it file an application for determination of the standard rent within a period of one month from the receipt of the notice dated 15th January 1979 or at all. The defendant no.1 was therefore clearly a defaulter and a decree for possession against the defendant no.1 under section 12(3)(a) of the Act is proper. The defendant no.1 has not challenged the said decree concurrently passed by the Courts below in this Court. The decree against the defendant no.1 on the ground of default has, therefore, become final.

Effect of a decree against the defendant no.1.

6. Though the appellate Court has held that the defendant nos.3 to 6 were the lawful sub tenants of the defendant no.1, the appellate Court has not made any modification in the decree for possession which

was jointly passed against all the defendants, on the ground of default in payment of the rent by the defendant no.1. Under General law of the Land i.e. Transfer of Property Act, a decree for possession against a lessee would normally bind the sublessees who claim under the lessee. Shri Walawalkar, learned counsel for the petitioner however submits that under the Bombay Rent Act, which is a special law, a decree for possession passed against a tenant on the ground of non payment of rent cannot be enforced a lawful sub tenant. A lawful subtenant cannot be evicted in execution of a decree for possession passed against a tenant on the ground of default in payment of the rent. Section 14 of the Act lays down that a lawful subtenant to whom the premises have been sublet prior to 1st day of February 1973 would on determination of the interest of a tenant for any reason would become a direct tenant of the landlord. Section 14 of the Act reads as under:-

> **"14. Certain sub-tenants and licensees to become tenant on determination of tenancy.**
>
> (1) When the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the 1st day of

> February, 1973 shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued.
>
> (2) Where the interest of a licensor, who is a tenant of any premises is determined for any reason, the licensee, who by Section 15-A is deemed to be a tenant, shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord, on the terms and conditions of the agreement consistent with the provisions of this Act".

Under section 14, a sub tenant becomes a direct tenant of the landlord on the same terms and conditions with effect from the date when the interest of a tenant in the premises is determined for any reason. The expression "is determined for any reason" means where the interest of a tenant has come to an end completely. The interest of a tenant to remain in possession of a premises does not come to an end on expiry of the period of contract or termination of contractual tenancy by a notice to quit; a tenant has a right to continue to remain in possession of the demised premises by virtue of the protection conferred to him under the provisions of the Act. That right of a tenant to remain in possession of the demised premises does not come to an end merely by efflux of time or termination of

contractual tenancy but the tenant continues to have a right under the Act to lawfully remain in possession of the premises until a decree for possession is passed against him in accordance with the provisions of the Act. Once a decree for possession is passed against a tenant under the provisions of the Act, his interest in the premises comes to an end completely and thereupon his sub tenant becomes a direct tenant of the landlord under section 14 of the Act.

7. I am fortified in this view by a decision of the Apex Court in Hiralal Vallabhram Vs. Kasturbhai Lalbhai reported in AIR 1967 S.C. 1853 wherein the Supreme Court held

> "We are of opinion that in the context of the Act this is not the meaning to be given to the words 'is determined for any reason'. These words in the context of the Act mean that where the interest of a tenant comes to an end completely, the pre-existing sub-tenant may, if the conditions of Section 14 are satisfied be deemed to be a tenant of the landlord. The interest of a tenant for purposes of Section 14 is (sic as) a contractual tenant comes to an end completely only when he is not only no longer a contractual tenant but also when he has lost the right to

> remain in possession which Section 12 has given to him and is no longer even a statutory tenant. In other words Section 14 would come into play in favour of the sub-tenant only after the tenancy of the contractual tenants has been determined by notice and the contractual tenant has been ordered to be ejected under Section 28 on any of the grounds in Section 12 or Section 13. Till that event happens or till he gives up the tenancy himself the interest of a tenant who may be a contractual tenant for purposes of Section 14 cannot be said to have determined i.e. come to an end completely in order to give rise to a tenancy between the pre-existing sub-tenant and the landlord".

This passage was quoted and followed in a more recent decision of the Apex Court in Anandram Chandanmal Munot Vs. Bansilal Chunilal Kabra reported in (2000) 1 SCC 10.

8. Aforesaid decisions make it clear that a sub tenant would become a direct tenant of a landlord on a decree for possession being passed against a tenant. It would follow therefrom that a sub tenant cannot be evicted in execution of a decree passed against a tenant on the ground of default. This would be so irrespective of whether a sub tenant is or is not a party to a suit for eviction filed by the landlord against a tenant. Under the general

principles of law, a lease is a transfer of interest in the property. The interest transferred to the lessee is a right to remain in possession of the premises for the whole of term of the lease unless the lease is sooner determined in accordance with law. Subject to a contract between the parties and provisions of Transfer of Property Act, a lessee has a right to further transfer his interest either by an assignment or by creating of a sub-lease. The interest which is transferred by a lessee to a sub-lessee would naturally be subject to the limitations on the interest of the lessee himself. A lessee cannot transfer to a sub-lessee any interest greater than his own interest. When a interest of a lessee comes to an end by reason of termination of lease either by afflux of time or by sooner determination in accordance with law, the interest transferred by a lessee to a sublessee would also come to an end. This would be the position under the general law. However, the Bombay Rent Act, which is a special piece of legislation, makes a departure from this principle. The right of a lessee to remain in possession does not come to an end merely because of expiry of the period of lease. A lessee tenant protected under the Bombay Rent Act

is entitled to continue in possession of the premises even after the expiry of the period of the lease by reason of protection conferred upon him by the Act. A lessee tenant, subject to a contract of the contrary, is not entitled to transfer his interest either by way of an assignment or by way of a sub-lease. The prohibition against subletting is relaxed in respect of a sub tenancy created prior to 1st day of February 1973 (see section 15(2) of the Act). A lawful sub-tenant in possession of the property on 1st day of February 1973 is protected by section 14 of the Act even after the interest of the head lessee-tenant comes to an end. Under the general law, a sub tenant would have gone with the tenant. However, section 14 provides otherwise and says that when an interest of a tenant is determined for any reason, a sub-tenant would become a direct tenant of the landlord. A sub-tenant would not go merely because interest of a tenant has been determined but the sub tenant would become a direct tenant of the landlord.

9. In view of the decisionis of the Supreme Court in Birdichand Hiralal Bhandari Vs. Sadashiv Maruti Borhade (Supra) and Anandram Chandanmal Munot

Vs. Bansilsl Chunnilal Kapra (Supra) it must be held that mere non payment of rent by the tenant to the landlord cannot result in the liability of the sub tenant for eviction; that militants against a guarantee and protection conferred to the sub tenant under section 14 of the Act. A single Judge of this Court in Mangharam Chubarmal Vs. B.C. Patel reported in (1970) 73 Bom LR 140 has taken a similar view. Contrary view taken by the Division Bench in this Court in Indian Coffee Workers Co-op. Stores Ltd. Vs. Bachoobai Cowasjee Dhanjeeshaw reported in (1964) 66 Bom LR 338 is not a good law in view of the decision of the Supreme Court in Anandram Chandanmal Munot Vs. Bansilal Chunilal Kabra (Supra). Therefore, a lawful sub tenant cannot be evicted in execution of a decree for possession passed against a tenant for non payment of a rent whether a sub-tenant is a party to the suit or not.

10. In this view of the matter, though the decree for possession passed against the defendant no.1 by the trial Court and confirmed by the appellate court has to be upheld, the decree for possession passed against defendant nos.3 to 6 cannot be sustained. The defendant no.3 would

become a direct tenant of the plaintiff with effect from the date on which the interest of the defendant no.1 stood terminated by a decree for possession. In this case, it is not necessary to consider whether the interest stood terminated by a decree for possession passed by the trial Court or whether appeal being in continuation of the proceedings, it stood terminated by a decree of possession passed by the appellate Court, as that controversy does not arise in this petition.

11. For these reasons, Writ Petition no.4202 of 1991 is partly allowed and the decree for possession passed against the petitioners therein (i.e. the original defendant nos.3 to 6 is set aside.

12. Writ Petition No.738 of 1992 is dismissed.

In the facts and circumstances of the case, parties shall bear and pay their own costs throughout.

Authenticated copy allowed.

D.G. KARNIK, J